IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL.,
Petitioner,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Counsel for Petitioners.

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The petition of Schwegmann Brothers, a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, and of the individual partners, prays that writs of certiorari issue to review the

judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cases on July 27, 1950. A petition for rehearing filed August 10, 1950 (Seagram R. 112, Calvert R. 118) was denied September 15, 1950 (Seagram R. 123, and Calvert R. 129). The cases were consolidated by the Court of Appeals for briefing and argument (Seagram R. 93, Calvert R. 99), and one opinion was rendered by that Court. Though the cases are separately docketed in this Court, one petition is filed for two writs of certiorari.

OPINIONS BELOW

The judgment, findings of fact, and conclusions of law of the District Court are printed in the record (Calvert R. 83 *et seq.*, Seagram R. 79 *et seq.*). The opinion of the United States Court of Appeals (Seagram R. 97 *et seq.*, Calvert R. 103 *et seq.*) is reported in 184 F. (2d) 11.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S.C., Section 1254 (1).

STATUTES INVOLVED

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, Ch. 647, Sec. 1, 26 Stat. 209, 15

U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (Act 13 of 1936, La. R. S. 51:391-396). The pertinent statutory provisions are printed in Appendix A.

QUESTION PRESENTED

The question presented turns on the meaning of the Miller-Tydings Amendment: Does an exception to the Sherman Act, in terms limited to resale price maintenance by "contracts or agreements," i.e., contractual resale price maintenance, include resale price maintenance imposed by the substantive law of a state, not by contract or agreement, on unwilling non-contracting parties in transactions affecting interstate commerce?

STATEMENT OF THE CASE

The Louisiana Fair Trade Act, on which the complaints are predicated, is typical of fair trade statutes in forty-five states. It has two basic provisions. Section 1 provides that a *contract* shall not be invalid by reason of resale price-fixing provisions. Section 2, *the non-signer clause*, imposes resale price-fixing on non-contracting retailers.[1]

[1] Only Missouri, Texas, Vermont, and the District of Columbia have not enacted fair trade laws. See 2 CCH Trade Reg. Serv. (9th Ed.) Para. 7011 *et seq.* In the forty-five states which have adopted fair trade laws, the non-signer provision appears in almost identical form. The non-signer clause of the Louisiana Fair Trade Act provides: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." La. Act. 13 of 1936, §2.

Petitioners operate a super-market in New Orleans. They sell meat, vegetables, groceries, drugs, light hardware—and alcoholic beverages in packages. By an efficient operation, a volume business on a self-service, cash-and-carry basis, and hard work by the owners themselves, petitioners are able to reduce their costs and pass on corresponding savings to their customers. Petitioners have been successful in a highly competitive field.

Calvert Distillers Corporation, complainant-appellee, alleged that the fair trade price for a fifth of "Calvert Reserve" is $4.24; that Schwegmann Brothers sold it for $3.35. (Calvert R. 10.) Seagram-Distillers Corporation, complainant-appellee, alleged that the fair trade price for a fifth of "Seagram's 7 Crown" is $4.24; that Schwegmann Brothers sold it for $3.51. (Seagram R. 10.) Complainants filed suit in the United States District Court for the Eastern District of Louisiana to enjoin defendants from selling Calvert and Seagram products for less than the minimum prices fixed in fair trade contracts between complainants and certain Louisiana retailers.[2] The complaints were based on the non-signer clause (Section 2) of the Louisiana Fair Trade Act: complainants did not pretend to have any contractual relationship with defendants. John Schwegmann, Jr. admitted the sales; testified that he had never signed any fair trade contract; stated that his policy was to buy cheaply, to operate economically, and to pass on savings to consumers. (Calvert R. 67-68.)

[2] For purposes of trial, the causes were consolidated and a stipulation entered that exhibits and testimony should be considered applicable in both causes, insofar as relevant. Seagram R. 26, *et seq.*

The Louisiana price-fixing actions of each complainant were an inseparable element of an integrated, uniform, nation-wide, price-fixing program involving interstate transactions and dependent for its success upon activities affecting interstate commerce. The District Court had no doubt as to the interstate character of the transactions involved. (Calvert R. 48.) The Court of Appeals was of the same opinion: "... the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of Congress over it as to bring plaintiffs' activities within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them."

Petitioners contend that price-fixing applied to non-contracting retailers is an unlawful restraint of trade.[3] The argument against this contention invokes the Miller-Tydings Amendment which excepts from the Sherman Act "*contracts or agreements,*" valid under state laws, fixing resale prices. Before the District Court, the Court of Appeals, and now this Court, petitioners have consistently maintained that the Miller-Tydings Amendment means exactly what it says—the exception applies only to *contractual* price-fixing; it cannot be extended to immunize non-contractual price-fixing. Petitioners' position rests on two main arguments:

(1) The language of the Amendment is so clear and unambiguous, the court should not resort to extrinsic aids to determine the legislative intent; however,

[3] Resale price-fixing *per se* violates the Sherman Act because it tends to eliminate competition. *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 296, 65 S. Ct. 661, 663 (1945); *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 60 S. Ct. 811 (1940). See also *United States v. Masonite Corporation*, 316 U. S. 265, 62 S. Ct. 1070 (1942); *United States v. Univis Lens Co., Inc.*, 316 U. S. 241, 62 S. Ct. 1088 (1942); *United States v. Trenton Potteries Company*, 273 U. S. 392, 47 S. Ct. 377 (1927); *United States v. A. Shrader's Sons, Inc.*, 252 U. S. 85, 40 S. Ct. 251 (1920).

(2) A careful study of the legislative history and other sources proves that Congress did not intend the Amendment to be applicable to resale price maintenance against non-contracting parties.

The District Court rendered judgment in favor of complainants, in reliance on *Pepsodent v. Krauss*, 56 F. Supp. 922 (D. C., E. D. La. 1944) the only reported case passing on the questions presented in this petition. In that case the court examined the legislative history of the Miller-Tydings Amendment and concluded that Congress was aware of the existence of the non-signer provision in state fair trade acts and therefore must have intended the Amendment to apply to non-signers.

In the Court of Appeals the majority and minority opinions conceded that the Miller-Tydings Amendment "is free from ambiguity and that there is no occasion to resort, or propriety in resorting, to its legislative history to find its meaning." The majority of the court below, however, held that the Miller-Tydings Amendment not only removed Sherman Act prohibitions from resale price maintenance contracts entered into pursuant to state law but also permitted enforcement of resale prices against non-contracting parties, in transactions affecting interstate commerce.[4] The dissenting opinion expressed strongly the view that "the majority opinion enlarges and extends the provisions of the statute to a scope not justified by the legislative language."

[4] The opinion stated that lifting of Sherman Act prohibitions of resale price maintenance contracts removed "every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws, binding alike on signers and non-signers." The fallacy of the Court is to treat the problem as one of authority of the states *to enact* fair trade laws, while the problem actually is the *enforceability* of fair trade contracts, valid under state law, against a non-contracting party in an interstate transaction. See page 9.

REASONS FOR GRANTING THE WRITS

(1) The decision of the court below is one of major importance to all interested in the legal aspects of restraint of trade and statutory construction. But of greater importance are the practical aspects of its impact in the field of economics.[5] This case involved the price of a bottle of Calvert and a bottle of Seagram; the principle involved will affect the price of food, drugs, clothing, and other necessities of life.[6] The decision will have a stultifying effect on merchandising methods of hundred of thousands of independent retailers who, like Schwegmann Brothers, by efficient management of a minimum-service business, are able to reduce their costs and pass on corresponding savings to consumers. The decision of the court below stimulates price-fixing by thousands of manufacturers and distributors who until now have refrained from attempting to enforce resale price maintenance against non-signers in transactions affecting interstate commerce. The decision has an immediate and continuing adverse effect on 140 million consumers in forty-five states who must pay more for the goods they buy than the goods are worth in a free market. In normal times this would be serious enough. In the present crisis detonated by the Korean war, perhaps

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[5] For well documented discussions of the economic aspects of fair trade legislation, see *Report on Resale Price Maintenance of Federal Trade Commission—Submitted to Congress December 13, 1945;* Grether, *Price Control Under Fair Trade Legislation* (1939); Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 Cal. L. Rev. 640 (1936); Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24 (1949).

[6] For two recent critical discussions of the breadth of fair trade coverage and the adverse economic effects of fair trade on the price structure, see Fortune Magazine, *The Not-So-Fair Trade Laws* (January 1949) and Fortune Magazine, *The "Fair" Trade Controversy* (April 1949).

the first of a long series of crises or the start of one of long duration, in a period of rapidly rising costs of living, the danger of inflation omnipresent—the seriousness of a decision broadening the scope of a statute inherently inflationary increases in geometric progression.[7]

(2) The meaning of the Miller-Tydings Amendment, has not been clarified by the majority opinion of the court below—with all due deference and respect for the learned court.

(a) Both the majority and minority of the court below were of the opinion that the Amendment was clear and unambiguous, so plain that it would be improper to examine legislative history. Yet the Amendment meant one thing to the majority of the court, an entirely different thing to the minority of the court. As used in the Amendment, the term "contracts or agreements" would seem to be clear and unambiguous. But as construed in the majority opinion, "contracts" does not mean contracts. In effect, "contractual" includes non-contractual—just as if the term "negotiable instruments" in a statute includes non-negotiable instruments. According to the majority opinion, non-contracting parties bear the same burdens as contracting parties.

[7] "If the whole direction of resale price maintenance must be to favor the less efficient retailer and to block the use of standard techniques in aggressive and economical merchandising, then the end result must be that Fair Trade laws raise prices on Fair Traded goods." Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 50 (1949). The Federal Trade Commission *Report on Resale Price Maintenance* points out that ". . . price increases [resulting from fair trade legislation] fell most heavily upon those consumers who from necessity or personal choice patronize minimum-service stores."

(b) The majority opinion states that the "main battleground" is "whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act, the price maintenance *contracts* relied on in this case." It is believed that the court below misconceived the issue. There has never been any dispute over the application of the Amendment to contracts, that is, the enforceability of resale price maintenance between contracting parties. The dispute is over the application of the Amendment to price-fixing over and beyond contracts, that is, the enforceability of resale price maintenance against non-contracting parties.

(c) The court below makes several references to the inherent power of states to enact fair trade statutes; for example, the court states that "in insisting that the Miller-Tydings Amendment is ineffective . . . as to non-signers, because it . . . does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly misconceive the issue." Petitioners do not question a state's power to enact fair trade legislation. But a state's authority is limited by the commerce clause of the United States Constitution and the Sherman Act in transactions affecting interstate commerce.[8] Proponents of the legislation found it necessary to secure the Miller-Tydings exception for contractual resale price maintenance; the state's inherent powers did not protect contracts in restraint of interstate trade. For the same reason—a specific exception is needed for non-contractual resale price maintenance.

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[8] U. S. Const., Art. 1; *United States v. Frankfort Distilleries, Inc.*, 324 U. S. 293, 65 S. Ct. 661 (1945); *cf. H. P. Hood and Sons v. Dumond*, 336 U. S. 525, 69 S. Ct. 657 (1949).

(d) The Miller-Tydings Amendment merely excepts from the Sherman Act "contracts or agreements," otherwise illegal,[9] fixing minimum resale prices, when such contracts are lawful as applied to intrastate transactions under state law. The majority of the Court, however, reached the sweeping conclusion that the Amendment "removed every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws, binding alike upon signers and non-signers." It is believed that the correct view is that stated in the minority opinion:

> "The amendment deals only with 'contracts and agreements' and in the absence of any enlarging provision, furnishes no basis for incorporating as an exemption from the Sherman Act any provision of a state statute which restrains interstate commerce by provisions applicable to those who have not made the 'contracts and agreements'."

(3) Petitioners believe that the Miller-Tydings Amendment is so clear that there should be no resort to extrinsic aids to determine its meaning.[10] However, a careful study

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[9] The first attempts at resale price maintenance were made under the copyright laws by attempts to analogize the rights of a copyright owner to those of a patent owner. This Court held that copyright laws do not give the right to control future retail sales. *Bobbs Merrill Co. v. Strauss*, 210 U. S. 339, 28 S. Ct. 722 (1908). Subsequently, attempts were made to coerce retailers into maintaining resale prices by means of contracts. Although the mechanics of these schemes varied, in general they involved a contract between a manufacturer and a retailer fixing minimum resale prices. In the leading case of *Dr. Miles Medical Co. v. John D. Parke & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376 (1911), the Supreme Court outlawed resale price maintenance contracts, a decision that retained its vitality until the passage of the Miller-Tydings Act. This Court reiterated this principle in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139 (1936), upholding the constitutionality of the Illinois and California Fair Trade Acts.

[10] See *Caminetti v. United States*, 242 U. S. 470, 37 S. Ct. 192 (1917), and *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 57 S. Ct. 77 (1936), in which the plain meaning of a statute was applied, although a different result would have been reached had

of the legislative history and other sources demonstrates, as stated in the minority opinion, that:

> "... the Miller-Tydings Amendment goes no further than to remove the taint of illegality attendant upon such contracts as to interstate transactions (Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 373) as is removed by section 1 of the Louisiana Act now in question as to intrastate transactions... The terms of the Federal Amendment no more embrace Section 2 of the Louisiana Act than does Section 1 of that Act."

(a) The Miller-Tydings Amendment parallels, word for word, Section 1, the contract provision, of a typical fair trade law but has no language analogous to Section 2, the non-signer provision, and omits any reference to resale price maintenance against non-contracting parties. The substantive identity and the close formal relationship between the Miller-Tydings Amendment and Section 1 of a typical fair trade law is apparent from a comparison of these statutory provisions which are printed in parallel columns in Appendix B.

(b) The Miller-Tydings Amendment is almost identical with H. R. 1611 and S. 100 of the 75th Congress, 1st Ses-

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the Court relied on legislative history. Recently this Court stated: "The argument from the legislative history undertakes, in effect, to contradict the terms of Section 8 (f) . . . The plain words and meaning of a statute cannot be overcome by a legislative history which . . . may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling*, 324 U. S. 244, 260, 65 S. Ct. 605, 614-115 (1945). Last year this Court reasserted this principle, citing the *Gemsco* case, in the following language: "Petitioners' chief argument proceeds not from one side or the other of the literal boundaries of Section 1404 (a) [of the Judicial Code], but from the legislative history. *The short answer is that there is no need to refer to the legislative history where the statutory language is clear* . . . This canon of construction has received consistent adherence in our decisions." (Italics supplied.) *Ex Parte Collett*, 337 U. S. 55, 61, 69 S. Ct. 944, 947 (1949).

sion, which in turn were virtually identical with S. 3822 of the 74th Congress, 2nd Session.[11] This latter bill was introduced January 27, 1936, before the decision in *Old Deaborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183, 57 S. Ct. 139 (1936), and less than three years after the first enactment of a non-signer provision, at a time when there were only about a dozen states with fair trade acts. S. 3822 and, of course, its derivative bills, are substantially identical with the Capper-Kelley bill, introduced in Congress in 1927, 1928, and 1931.[12] At that time there were no statutes with non-signer provisions in existence. Indeed, there were no fair trade laws.[13] All of these bills, and others which might be cited, go back to the Stevens bill in 1914,[14] which was drafted and advocated simply to overcome the effect of the *Dr. Miles* case.

(c) Petitioners believe that an objective weighing of all the reports and congressional debates impels one to conclude that the intent of Congress was to authorize only permissive resale price maintenance contracts which buyer and seller could enter into "if they want to do so."[15] There was no congressional intent to except from the Sherman Act non-contractual resale price maintenance imposed on unwilling, non-contracting parties. See Appendix C, Summary of Legislative History of Miller-Tydings Amendment.

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[11] *Compare* 80 Cong. Rec. 8433 *with* 81 Cong. Rec. 2133. The Senate Committee Report stated that, since S. 100 (75th Cong., 1st Sess.) was "similar" to S. 3822 (74th Cong., 2d Sess.), the report on S. 3822 (S. Rep. No. 2053, 74th Cong., 2d Sess.) of the previous Session of Congress was applicable to S. 100, under consideration by the Committee. S. Rep. No. 257, 75th Cong., 1st Sess. See also H. R. Rep. No. 382, 75th Cong., 1st Sess.

[12] The text of the Capper-Kelley bill, as introduced in 1931, is contained in H. R. 11, 71st Cong., 3d Sess.

[13] California enacted the first fair trade law in 1931. The first non-signer clause was added by amendment in 1933.

[14] H. R. 13305, 63d Cong., 2d Sess. See also the "Metz" bill, H. R. 13860, 63d Cong., 2d Sess.

[15] 81 Cong. Rec. 8140, 8141.

(4) The opinion of the court below "enlarges and extends the provision of the statute to a scope not justified by the legislative language." [16] Such an interpretation is contrary to the settled principle of statutory construction that an exception or proviso should be narrowly construed.[17] The opinion of the court below might be simply of unusual academic interest as a departure from accepted principles of statutory construction. But it is more. The court construed the Sherman Act, the statute which officially commits the federal government to defend a competitive economy and embodies what is probably the most important statement of principles in the American philosophy of free enterprise. The Miller-Tydings Amendment is relatively new. The advocates of resale price-fixing for thirty years submitted bill after bill to Congress before they were successful in obtaining an exception for resale price maintenance contracts.[18] The Amendment is clearly in derogation of the philosophy of the Sherman Act, "an unjustified reversal of policy . . . an aberration, fostered, and propelled by a minority pressure group.[19] Critics in

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[16] Minority opinion. Seagram R. 106; Calvert R. 112.

[17] Sutherland on Statutory Construction (3d Ed. 1943), Sections 4830, 4933. Section 4933 states: ". . . The legislative purpose set forth in the general enactment expresses the legislative policy *and only those subjects expressly exempted by the proviso should be freed from the operation of the statute.*" See, for example, *United States v. Dickson*, 15 Pet. (40 U. S.) 141 (1841); *United States v. Maryland Casualty Co.*, 49 F. (2d) 556 (CCA 7, 1931).

[18] The Miller-Tydings Act found its way into the law in the closing days of the legislative session of the Seventy-Fifth Congress as a rider to a District of Columbia Appropriation Bill (H. R. 7472), after Congress had failed to act on fair trade bills previously introduced, reported, and debated. When the bill reached the President's desk for signature, a veto of the bill would have handicapped the operation of the City of Washington. President Roosevelt had consistently opposed such legislation and, when he signed the bill, he expressed the hope that the act "will not be as harmful as most people predict." N. Y. Times, Aug. 19, 1937, p. 26, col. 1.

[19] Rose, *Resale Price Maintenance*, 3 Vanderbilt L. Rev. 24, 54 (1949). Another authority has been equally critical: "These [fair trade] laws are completely inconsistent with the philosophy of free enterprise and the pattern of our other legislation. They disregard the interest of the consumer in price competition, protect a particular class of producers and favor the inefficient, high cost distributor rather than the efficient seller." Loevinger, *Law of Free Enterprise* (1948), p. 283.

high places have condemned the Amendment.[20] It is in the public interest that the limits of such an exception to fundamental national policy be surveyed and clearly marked by this Court.

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted,

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SAUL STONE,
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Counsel for Petitioners.

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[20] The Federal Trade Commission and the Department of Justice opposed enactment of the Miller-Tydings Amendment when it was pending before the Congress, and now stand in favor of its repeal. *On the verge of World War II*, the Department of Justice recommended "the repeal of the Miller-Tydings Amendment . . . Already the record shows that it does not serve the purposes which were urged upon Congress as a reason for its passage, that it sanctions arrangements inconsistent with the purpose of the antitrust laws, and that it becomes a cloak for many conspiracies in restraint of trade which go far beyond the limits established in the amendment." The Consumer Commissioner of the National Defense Advisory Commission "strongly urged" the repeal of the Amendment. The Temporary National Economic Committee approved the following recommendation: "The Miller-Tydings Enabling Act, which legalizes resale price maintenance contracts in interstate commerce, results in some of those economic and social practices to be expected from private price-fixing conspiracies. The legal sanction of such practices tends to undermine the basic tenets of a competitive economy and introduces rigidities into the pricing of certain goods which restrain trade. Consequently, we recommend to the Congress the repeal of the Miller-Tydings Enabling Act." *Federal Trade Commission Report on Resale Price Maintenance*, (1945), LX-LXIV. Condemnation has continued. See *Third Annual Report to the President by Council of Economic Advisors;* Bergson, *Current Problems in the Enforcement of the Anti-Trust Law*, Address to Bar Ass'n of the City of New York, Feb. 17, 1949; N. Y. Times, Feb. 18, 1949, p. 19, col. 1.

APPENDIX A

PERTINENT STATUTES

Louisiana Fair Trade Act

AN ACT.

To protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name.

Section 1. Be it enacted by the Legislature of Louisiana, That *no contract* relating to the *sale* or *resale* of a commodity which bears, or the label or content of which bears, the trade mark brands, or name of the *producer or owner* of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Louisiana by reason of any of the following provisions which may be contained in such contract:

1. That the *buyer* will not *resell* such commodity except at the *price stipulated by the vendor.*

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, *resell* except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed *to contain or imply conditions* that such commodity *may be resold* without reference to such agreement in the following cases:

1. In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Section 2. *Wilfully* and *knowingly* advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is *unfair competition* and is actionable at the suit of any person damaged thereby.

Section 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

Section 4. The following terms, as used in this Act, are hereby defined as follows:

"Producer" means grower, baker, maker, manufacturer or publisher.

"Commodity" means any subject of commerce.

Section 5. If any provision of this Act is declared unconstitutional it is the intent of the Legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Section 6. This Act may be known and cited as "Fair Trade Act." Approved by the Governor: June 26, 1936.

Sherman Anti-Trust Act, as Amended by Miller-Tydings Amendment

Every contract, *combination in the form of trust or otherwise*, or conspiracy, in *restraint of trade* or commerce

among the several States, or with foreign nations, is hereby declared to be illegal; *Provided*, That nothing contained in sections 1-7 [the Sherman Act] of this title shall render illegal, *contracts or agreements* prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, *when contracts or agreements* of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, *and the making of such contracts or agreements* shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further*, That the preceding proviso shall not make lawful *any contract or agreement*, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

APPENDIX B

COMPARISON OF TYPICAL FAIR TRADE LAW AND MILLER-TYDINGS ACT

Louisiana Fair Trade Act.	Miller-Tydings Act.
(1) No contract relating to the sale or **resale of a commodity which bears, or the label or** content **of which bears, the trade mark brand, or name of the producer** or owner **of such commodity, and which is in** fair **and open competition with commodities of the same general class produced by others** shall be deemed in violation of any law of the State of Louisiana . . .	Nothing contained in [the Sherman Act] shall render illegal contracts or agreements prescribing minimum prices for the **resale of a commodity which bears, or the label or** container **of which bears, the trade mark, brand, or name of the producer or** distributor **of such commodity, and which is in** free **and open competition with commodities of the same general class produced** or distributed **by others,** when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale . . .
(2) Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable . . .	

NOTE: Bold face indicates identity between statutes.

APPENDIX C

SUMMARY OF LEGISLATIVE HISTORY OF MILLER-TYDINGS AMENDMENT

(1) The Miller-Tydings Amendment tracks almost exactly Section 1 of a typical fair trade law but omits any reference to Section 2, the non-signer provision.

(2) With all the legislation introduced, the only author to speak was Senator Tydings. He interpreted each of two bills. He made no mention of the non-signer clause or of any intention to make the Amendment effective against non-contracting parties. On the contrary, tracking the language of the *Old Dearborn* case upholding Section 1, Senator Tydings explained that his bill was simply to authorize permissive contracts. 81 Cong. Rec. 7496.

(3) In none of the original reports of the Congressional Committees of the 75th Congress which considered H. R. 1611 and S. 100 (the immediate sources of the Miller-Tydings Amendment), and in none of the reports of the Congressional Committees of prior Sessions of Congress, which considered proposed legislation substantively identical with H. R. 1611 and S. 100, is the non-signer clause discussed as included in the immunity granted contractual resale price maintenance by the proposed legislation. S. Rep. No. 2053, 74th Cong., 2d Sess.; S. Rep. No. 257 and H. R. Rep. No. 382, 75th Cong, 1st Sess. *Cf.* S. Rep 879, 75th Cong, 1st Sess.

(4) Of the numerous members of both Houses who spoke on the proposed legislation, the large majority referred to the purpose of the legislation as one to author-

ize "contracts or agreements" in the ordinary and usual sense, without reference to resale price maintenance imposed by statute on non-contracting parties. See, for example, 80 Cong. Rec. 8433; 81 Cong. Rec. 7487, 7489, 7495, 7496, 8139, 8140. One member referred to the non-signer clause so that it might be inferred from his reference that the other members may have been appraised of the provision. 81 Cong. Rec. 7491. Aside from this reference, only one other member presented directly in the debate his thought that the pending legislation would make the non-signer clause effective *quoad* interstate commerce. 81 Cong. Rec. 8143.

(5) The Miller-Tydings bill evolved from the Stevens bill, introduced in 1914, and the Capper-Kelley bills, introduced in 1927, 1928, and 1931, before the enactment of the first non-signer provision. The purpose of the Stevens and Capper-Kelley bills was to write into the law the minority opinion in the then recent *Dr. Miles* case. See footnote 9. As Justice Holmes, however, was careful to point out in the minority opinion: "There [was] no attempt to attach a contract or condition to the goods . . . The only question [was] whether the law forbids a purchaser to contract with his vendor that he will not sell below a certain price . . ." Some members of Congress, and the House Committee Report on H. R. 1611, specifically stated that the Amendment to the Sherman Act was intended to permit contracts otherwise illegal in interstate commerce under that decision. H. R. Rep. 382, 75th Cong., 1st Sess. One House Member specifically stated: "The measure complements existing state law and will make legal what was condemned by the Supreme Court in 1910 in the case of *Dr.*

Miles Medical Co. v. Parke & Sons Co., (220 U. S. Rep. 373). The report of the proponent of the bill, Mr. Miller, calls attention to the opinion of Justice Sutherland [in the *Old Dearborn* case], upholding the constitutionality of the Illinois Price-Fixing Act. The House will be interested to know that such price-fixing acts supplemented by this legislation *will write into the law the minority opinion of Mr. Justice Holmes, filed in the Miles case.* Mr. Justice Holmes' language in this dissenting opinion was vigorous and incisive, and *the principle laid down in his dissenting opinion is the genesis of this pending measure . . .*" 81 Cong. Rec. 8139, 8140.

(6) At the time the Administration objected to the provisions of S. 100 and H. R. 1611 on the ground that they might be construed to bind non-signers, the proposed legislation authorized contracts "prescribing minimum resale prices or other conditions." The phrase "or other conditions" was then removed, presumably to meet this objection. Thereupon Senator Tydings stated that he had conferred with the Administration and that the proposed legislation (plus a clause prohibiting horizontal agreements) obviated the objections raised by the Administration. 81 Cong. Rec. 7487.

This is to certify that copies of this petition have been served on counsel for respondents on this the .... day of December, 1950.

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